

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

**UNITED STATES' OPPOSITION TO "DEFENDANT B&H'S
MOTION FOR DISCLOSURE OF GRAND JURY MATERIALS" (DOCKET # 44)**

Defendant B&H Maintenance & Construction, Inc. ("B&H") has filed a Motion (Docket #44) requesting that the Court order the United States to disclose "the testimony and corresponding exhibits presented to the grand jury" on the grounds that they "are necessary for the preparation of the defense."¹ B&H's Motion falls woefully short of making even a colorable showing of necessity for disclosure of grand jury materials pursuant to Federal Rule of Criminal Procedure 6(e). Thus, Defendant B&H's Motion should be summarily denied.

¹ Defendant Martin (Martin Mot. to Join Mots. Filed by B&H (Docket #49)) has moved to join Defendant B&H's Motion for Disclosure of Grand Jury Materials. Should the Court grant that motion to join, this response would also apply to that motion.

I. Grand Jury Matters are Secret Pursuant to Federal Rule of Criminal Procedure 6(e)

Federal Rule of Criminal Procedure 6(e) provides that matters occurring before the grand jury are secret and may not be disclosed other than pursuant to specific exceptions set forth in the Rule. Federal Rule of Criminal Procedure 6(e)(2)(E)(i) provides that the court may order disclosure "preliminarily to or in connection with a judicial proceeding."

II. Particularized Need is the Standard for the Court to Order a Disclosure of Grand Jury Matters

Reflecting back on the earlier cases of *United States v. Procter & Gamble*, 356 U.S. 677 (1958) and *Dennis v. United States*, 384 U.S. 855 (1966), the Supreme Court in *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211 (1979), addressed the standard that must be met to overcome the presumption that grand jury secrecy applies to transcripts of testimony to a federal grand jury.

Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Id. at 222. The Court went on to say that disclosure is only appropriate where the need "outweighs the public interest in secrecy," and that the burden of demonstrating this need is on the party seeking disclosure. *Id.* at 223. *See also United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 443 (1983).

In *In re Grand Jury 95-1*, 118 F.3d 1433, 1437 (10th Cir. 1997), overturning the lower court's authorization of disclosure of grand jury materials, the Tenth Circuit said "[t]he prerequisites for disclosure of grand jury materials are demanding." The request must be more

than one for "authorization to engage in a fishing expedition." *Id.* (citations omitted) *See also United States ex rel. Stone v. Rockwell Int'l. Corp.*, 173 F.3d 757, 759 (10th Cir. 1999) ("The most significant factor" to be considered in the release of grand jury materials is "the demonstration of a 'particular, not a general, need'" for the materials); *In re Special Grand Jury 89-2*, 143 F.3d 565, 570 (10th Cir. 1998); *In re Lynde*, 922 F.2d 1448, 1452 (10th Cir. 1991); *United Kingdom v. United States*, 238 F.3d 1312, 1321 (11th Cir. 2001) ("[T]he fact that these items are being sought by defendants in a criminal case for use in defending the charges brought against them is insufficient standing alone.")

III. Defendant B&H has Made no Showing of Particularized Need

B&H has made no showing at all of particularized need for the grand jury transcripts and exhibits it requests in its Motion. It cites neither facts nor caselaw in support of its claim. It merely states that it needs the grand jury transcripts and corresponding exhibits to prepare its defense. In essence, what B&H has said is: "It would help us to see what the grand jury saw." No showing of particularized need has been made, and thus Defendant B&H's Motion should be denied.

IV. Conclusion

The United States has more than complied with its discovery obligations under Federal Rule of Criminal Procedure 16, and its obligations to disclose evidence favorable to the Defendants as required by *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Bagley*, 473 U.S. 667 (1985). It will continue to comply with those obligations. To the extent that Defendant B&H's Motion seeks documents (grand jury

exhibits), those documents have already been provided to the Defendants by the United States pursuant to its obligations under Federal Rule of Criminal Procedure 16(a)(1)(E). Providing those documents again, but with grand jury exhibit numbers on them, would not aid the Defendant in the preparation of its defense, it would only reveal matters occurring before the grand jury.

Defendant B&H's request for the wholesale disclosure of grand jury transcripts and exhibits is unwarranted and supported by nothing except the bald assertion that it needs to see whatever the grand jury considered in order to "prepare its defense." No need, much less a particularized need, has been shown by Defendant B&H. Thus, B&H's Motion should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I electronically filed the foregoing United States' Opposition to "Defendant B&H's Motion for Disclosure of Grand Jury Materials" (Docket # 44) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

gjohnson@hmflaw.com

hhaddon@hmflaw.com

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patrick-j-burke@msn.com

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane Lotko-Baker

DIANE C. LOTKO-BAKER

s/Carla M. Stern

CARLA M. STERN

s/Mark D. Davis

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